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In the Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA, PETITIONER

v.

TWIN CITY POWER COMPANY AND WILLIAM P. DAUCHY, ITS MORTGAGEE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SIMON E. SOBELOFF,
Solicitor General,
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Washington 25, D. C.

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above case on August 30, 1954.

OPINIONS BELOW

The opinion of the court of appeals (pp. 1a-19a, *infra*) is reported at 215 F. 2d 592. The district court filed three opinions, dated October 1, 1949 (R. 1-21), August 26, 1953 (R. 67-79), and November 14, 1953 (R. 79-83). The first two of these opin-

ions are reported, appearing at 86 F. Supp. 467 and 114 F. Supp. 719, respectively. The commissioners' report to the district court is set forth at R. 21-67.

JURISDICTION

The judgment of the court of appeals (p. 20a, *infra*) was entered August 30, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

When the United States, exercising the power of eminent domain, condemns land on a navigable river for a project in aid of navigation, is the condemnee entitled to receive, as an element of just compensation for "private property" taken, a special increment based upon the land's adaptability to use as a site for hydroelectric power operations?

STATUTE INVOLVED

The Act of December 22, 1944, c. 665, 58 Stat. 887, provides in pertinent part:

> In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible

extent established and potential uses, for all purposes, of the waters of the Nation's rivers; to facilitate the consideration of projects on a basis of comprehensive and coordinated development; and to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.

* * * * *

SEC. 10. That the following works of improvement for the benefit of navigation and the control of destructive flood waters and other purposes are hereby adopted and authorized in the interest of the national security and with a view toward providing an adequate reservoir of useful and worthy public works for the post-war construction program, to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein * * *

* * * * *

SAVANNAH RIVER BASIN

The general plan for the comprehensive development of the Savannah River Basin for flood control and other purposes recommended by the Chief of Engineers in House Document

Numbered 657, Seventy-eighth Congress, second session, is approved and the construction of the Clark Hill Reservoir on the Savannah River in South Carolina and Georgia, is hereby authorized substantially in accordance with the recommendations of the Chief of Engineers in that report at an estimated cost of $35,300,000.

STATEMENT

The essential facts, which are undisputed, may be summarized as follows:

The Savannah River is a navigable stream (see the opinion of the court of appeals, *infra*, p. 9a). In 1944, Congress, declaring its intention "to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized," approved projects in various areas of the country, including a general plan for the comprehensive development of the Savannah River Basin as "recommended by the Chief of Engineers in House Document Numbered 657, Seventy-eighth Congress, second session" (Act of December 22, 1944, *supra*, pp. 2-4). By the same Act and in implementation of the plan, Congress authorized "the construction of the Clark Hill Reservoir on the Savannah River in South Carolina and Georgia" (*ibid.*).[1]

[1] As stated in House Document 657, the specific navigation purpose of the Clark Hill project was to obtain a regulated flow of water so as to insure a minimum channel depth of 7 feet from Augusta, Georgia, to the mouth of the Savannah River (pp. 62-63). The improvement of the channel, it was estimated by Army Engineers, would result in an annual sav-

By three suits instituted in the United States District Court for the Western District of South Carolina,[2] the United States proceeded to condemn lands owned by respondent Twin City Power Company which covered a portion of the site designated for the project. For the same purpose, it filed three similar suits (not now before this Court) in the United States District Court for the Southern District of Georgia against Twin City's wholly owned subsidiary, Twin City Power Company of Georgia.

The lands taken from respondent (which are now under water) lay on either side of the Savannah River and extended some eleven miles upstream from a place known as Price's Island. These properties had been acquired by respondent between 1901 and 1910 as a prospective site for the reservoir of a dam which it hoped to build at Price's Island and to use in connection with a contemplated private power development. Between 1901 and 1919, Congress passed six separate acts granting respondent permits of limited duration authorizing construction of a dam at Price's Island. The last of these expired in 1922 without any action having

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ing of $186,000 on commerce and $15,000 on channel maintenance (p. 63). The achievement of this and other objectives of the Clark Hill project had been urged upon the President of the United States by resolutions of the South Carolina and Georgia legislatures and by numerous civic bodies in those states (p. 31). The other principal objectives of the project were flood control and the development of hydroelectric power *(ibid.)*.

[2] The suits were filed on June 23, 1947, December 21, 1949, and July 5, 1950. At the time each was instituted, a declaration of taking was filed.

been taken by respondent to build a dam or power plant. In 1928, the Savannah River Electric Company obtained a federal license to build, not at Price's Island, but at a mutually exclusive dam site on the river, Clark Hill. This license authorized Savannah to incorporate lands embracing Twin City's properties in the reservoir basin which would be created by the erection of a dam at Clark Hill. Savannah also failed to commence construction and it surrendered its license in 1932. Thereafter, over a period of years, the United States Army Engineers and the Federal Power Commission studied the feasibility of a public project at the Clark Hill site. Their recommendations that such a project be undertaken were adopted by Congress in 1944. At that time and until inundated by the United States, the properties involved were vacant and unimproved. See, generally, the district court's summary of the facts at R. 81-82. See, also, House Document 657, *supra*, and discussion of the history of the Clark Hill project in *Savannah Electric Co. v. Federal Power Commission*, 164 F. 2d 408, 409-411 (C.A. 4).[3]

Respondent's answers to the Government's suits claimed that the condemnee was entitled to compensation for loss of the peculiar value which the lands possessed, by virtue of proximity to the river, for power-site purposes (see R. 2). The Government moved to strike this claim (see R. 3) on the ground

[3] The decision in the *Savannah* case affirmed the Commission's refusal to entertain an application filed by Savannah in 1946 for a license to build at Clark Hill.

that the United States had asserted its dominant servitude in the navigable stream and that respondent, having no right in the flow of the river, could not assert as an element of loss of private property the adaptability of the land to use in connection with a water power project. The motion was overruled in the district court's first opinion (R. 1-21), and the cases were referred to three commissioners, pursuant to Rule 71A(h), Federal Rules of Civil Procedure, for trial on the issue of compensation. The Georgia district court appointed the same commissioners to fix the value of the Georgia lands of respondent's subsidiary.

In their report of May 14, 1953 (R. 21-67), the commissioners found that Price's Island "constituted a very good site for a hydro-electric power development" (R. 37) and that respondent was entitled to "water power value" (R. 52). On this basis, they fixed compensation for the total acreage owned by respondent and its subsidiary (4707.65 acres) at $1,257,033.20 (R. 60), of which $471,904.45 was assigned, on a pro rata basis, to the lands (1767.3 acres) located in South Carolina (R. 62).[4]

[4] The commissioners derived the amount of the total award from the testimony of respondent's witness Creager that, used in connection with a dam with a 60-foot head at Price's Island, the lands had a value of $1,600,000. Creager's appraisal was based on his estimate that the annual cost of operating a hydroelectric plant at that place would be $139,000 less than for a plant generating power by steam. Capitalized at six per cent, the annual saving of $139,000 came to about $2,300,000 which Creager, for various reasons, reduced to $1,600,000. Among these was his conclusion that for its reservoir respondent would have needed another 400 acres which it would have had to acquire at a "hold-up" price of

The commissioners also found that, if water power valuation were not the true basis for determining just compensation, the lands of respondent and its subsidiary would have a total value, for agricultural or forestry purposes, of $150,841.55 (R. 65-67).[5]

The commissioners' findings and conclusions were adopted by the district court (opinion of August 26, 1953, R. 67-79) and judgments were entered against the United States in the assigned amounts, together with interest (less appropriate credits for the amounts deposited with the declarations of taking as estimated compensation). In its subsequent opinion of November 14, 1953 (R. 79-83), the court overruled the Government's motions for amended and additional findings and for the entry of a new judgment.[6]

The court of appeals, affirming the judgment of the district court, held that it had been shown that there was a reasonable probability that the various

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$460 an acre (R. 56-58). Since this conclusion assumed that respondent's holdings included 745.58 acres which the commissioners found were claimed under options to purchase which had long since expired, the commissioners, adopting Creager's estimate of the cost of acquiring additional acreage, reduced the valuation to $1,257,033.20 (R. 58-59).

[5] On a per-acre basis, the comparison between the water power valuation and the valuation for agricultural-forestry purposes is approximately $267 as against $37.

[6] The United States District Court for the Southern District of Georgia also confirmed the commissioners' report. The United States has appealed from the judgments entered by that court to the Court of Appeals for the Fifth Circuit. It is expected that the Fifth Circuit case will be argued before the end of the calendar year.

tracts of land acquired by respondent would be used in connection with the development of water power; that use for this purpose was "the most profitable use of the land * * * taken"; and that "there is no basis in law or in reason why this element of value should be ignored." (pp. 6a-7a, *infra*).[7]

REASONS FOR GRANTING THE WRIT

Since federal projects in aid of navigation reach into every region of the country, the general importance of the question presented by this case seems clear. So far as we are aware, the opinions in the instant proceedings are the first to hold that lands condemned by the United States for such a project derive a special increment of compensable value from their susceptibility to use in connection with the power potential of the stream. This holding, we believe, is irreconcilable with principles firmly established by this Court's decision in *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53. It is also in direct conflict with holdings of the Ninth Circuit, rested upon *Chandler-Dunbar*, "that since a riparian owner has no property right in the bed of the stream or to the use of the water or the power inherent therein as against the United States, such riparian owner may not recover for the alleged power-site value of the riparian lands." *Washington Water Power Co.* v. *United States*, 135 F. 2d 541, certiorari denied, 320 U.S. 747. And see

[7] The court's opinion also stated (*infra*, p. 10a, fn.) that the purpose of the taking "was not improvement of navigation but flood control and water power development * * *." See discussion, *infra*, pp. 15-16.

Continental Land Co. v. *United States*, 88 F. 2d 104, certiorari denied, 302 U.S. 715.

1. The controversy in *United States* v. *Chandler-Dunbar Co.*, *supra*, arose when Congress enacted a statute revoking the company's license to maintain a dam in the St. Marys River (a navigable stream) and authorizing the Secretary of War to condemn adjacent land. In subsequent proceedings to condemn company land bordering the river, the trial court awarded $550,000 as compensation for "exclusion from the use of the water power inherent in the falls and rapids" of the river (229 U.S. at 59). Rejecting this allowance, this Court held that "the flow of the stream was in no sense private property" (p. 66), and that the concept of private ownership of the "running water in a great navigable stream" was "inconceivable" (p. 69). To this principle this Court has consistently subscribed. See *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 423-424, 427; *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 273; *United States* v. *Willow River Power Co.*, 324 U.S. 499, 508-509; *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 250.[8]

But Chandler-Dunbar not only claimed a loss of the direct ownership which it asserted in the rise and fall of the stream; it claimed additionally that

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[8] See, also, *Iriarte* v. *United States*, 157 F.2d 105, 110 (C.A. 1); *Continental Land Co.* v. *United States*, 88 F.2d 104, 109 (C.A. 9), certiorari denied, 302 U. S. 715; *Washington Water Power Co.* v. *United States*, *supra*; *United States* v. *Cox*, 190 F.2d 223, 296-297 (C.A. 10).

certain uplands which the Government took had an enhanced value as a factory site by virtue of proximity to the river's water power. This claim, based upon the physical relationship of the upland to the water power of a navigable stream, is precisely the kind of claim upon which Twin City's case here rests. Disallowing that claim in *Chandler-Dunbar*, this Court stated (pp. 75-76):

> These [the Government's] exceptions so far as they complain of the additional value to be attached to these parcels for use as factory sites in connection with the development of horsepower by the Chandler-Dunbar Company, must be sustained. These "additional" values were based on the erroneous hypothesis that that company had a private property interest in the water power of the river, not possibly needed now or in the future for purposes of navigation, and that that excess or surplus water was capable, by some extension of their works already in the river, of producing 6,500 horsepower.
>
> Having decided that the Chandler-Dunbar Company as riparian owners had no such vested property right in the water power inherent in the falls and rapids of the river, and no right to place in the river the works essential to any practical use of the flow of the river, *the Government cannot be justly required to pay for an element of value which did not inhere in these parcels as upland.* The Govern-

> ment had dominion over the water power of the rapids and falls and cannot be required to pay any hypothetical additional value to a riparian owner who had no right to appropriate the current to his own commercial use. *These additional values represent, therefore, no actual loss and there would be no justice in paying for a loss suffered by no one in fact.* [Emphasis added.]

It would be anomalous indeed, as the Court's opinion plainly recognized, to hold that the owner of riparian land has no right against the United States in the water power of a navigable stream, but that he may nonetheless claim for such land, when taken, a loss based upon "water power value." For that would be to require the United States to pay for something which already belongs to it by virtue of its dominant servitude in navigable waters; it would in fact impose a duty to pay for that which is inherent in the flow of the stream.

The court of appeals relied, however (see *infra*, pp. 14a-16a), upon still another aspect of the *Chandler-Dunbar* decision—the holding that the suitability of certain Chandler-Dunbar tracts for the building of a lock and canal was an element of value for which compensation should be paid (229 U. S. at 76-77). But this holding furnishes no support for the result reached in the instant case by the courts below. In *Chandler-Dunbar*, the maintenance of a canal on the upland was nowise dependent upon the power potential of the St.

Marys River. Accordingly, the award based upon the land's utility for canal purposes was in no sense predicated upon the notion that the riparian owner has a property interest in the flow of the stream—a concept which this Court rejected in the most emphatic terms. It is that notion which is the vice of respondent's claim here. Twin City's assertion that it has been deprived of a property interest, denominated "power site value" or "water power value," necessarily subsumes a property interest in the flow of the river, *i.e.*, a right to harness the potential of the stream. That premise is not permissible in the face of the United States' unqualified assertion of its dominant servitude in the stream.

It is immaterial that prior to 1944 respondent may have had reason to hope or to expect that the Federal Government might authorize a private rather than a public development.[8] "It is 'private'

[8] We note in passing that the probability that Price's Island would be licensed as a dam site had seriously diminished as early as 1928 when the first license was issued for construction at Clark Hill. See *supra*, p. 6. In this connection, we invite attention to a discrepancy between the district court's valuation and the rationale adopted by the courts below. The approved figure was based upon the testimony of respondent's expert as to the value of Price's Island as a site for a dam with a 60-foot head. *Supra*, p. 7, note 4. The courts did not find, however, that there was a reasonable probability that Price's Island would be used as a dam site, but only that it was probable that respondent's lands would be used for some purpose if there was a development at some point along the stretch of river. Even if some special increment of value were allowable to respondent by virtue of the proximity of its land to the stream, there would still be no basis for equating potential utility as part of a reservoir basin with potential utility as a dam site.

property' which the Fifth Amendment declares shall not be taken for public use without just compensation," and in the "absence of a statutory mandate * * * the sovereign must pay only for what it takes, not for opportunities which the owner may lose." *United States ex rel. T.V.A. v. Powelson*, 319 U. S. 266, at 280-282. When Congress adopted the recommendation of the Chief of Engineers and authorized the Clark Hill project, it effectively terminated prospects which, viewed most favorably, never constituted an interest in property, just as in *Chandler-Dunbar* the Congressional act summarily ended that company's profitable privilege of blocking the St. Marys River and using its water for power purposes.

This case, moreover, has nothing in common with *Federal Power Commission v. Niagara Mohawk Power Corp.*, 347 U. S. 239, in which this Court held that a private company had state-created usufructuary rights in the Niagara River, and that the scheme and history of the Federal Power Act reflected an intention to recognize rather than supersede these rights. Twin City lays no claim to an established and recognized usufructuary interest in the Savannah River, but rests on the contention that its lands should be accorded a special value by virtue of their adaptability to use in connection with a multi-purpose project which the Federal Government has undertaken to build. We believe it plain that, in the absence of federal authorization, respondent had no right to build a dam in the navigable river or to undertake a project

for the control or development of the stream. And, far from recognizing such a right, the statute here involved authorizes a public project which physically precludes respondent from building a dam or power plant at Price's Island.[10]

The court of appeals' opinion also denies that the Clark Hill project is actually one in aid of navigation (*infra*, p. 10a, fn.). Plainly, this is unfounded. In the 1944 Act (*supra*, pp. 2-4), Congress explicitly declared, upon the basis of detailed engineering studies which were submitted to it (see p. 4, n. 1, *supra*), that the project would result in "a substantial benefit to navigation"—a view, incidentally, in which the states of South Carolina and Georgia fully concurred (see *ibid.*).[11] There is nothing in this record to cast doubt upon the validity of the conclusion reached by Congress, and certainly nothing to show that it was wholly unreasonable or arbitrary. In these circumstances,

[10] The court of appeals also relied upon *United States* v. *Kansas City Ins. Co.*, 339 U. S. 799, which it described as "very much in point" (p. 11a, *infra*). But that case held merely that the destruction of the agricultural value of land by subterranean seepage of water constituted a taking within the Fifth Amendment. The measure of compensation was not involved and there was no claim that the condemned lands had "power site value." We do not suggest that a riparian owner is not entitled to compensation for loss or damage of his land consequent upon the Government's initiation of a project in aid of navigation. We urge only that the riparian owner is not entitled to enhanced valuation in the form of so-called "power site value."

[11] This, of course, is not to minimize the highly important flood control and power developmental purposes which the project is also designed to serve.

we submit, the legislative determination is controlling. *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 527-535; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 62, 64; *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421, 430; cf. *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 426; *Berman* v. *Parker*, No. 22, this Term, decided November 22, 1954.

2. The decision below is in conflict with the decisions of the Court of Appeals for the Ninth Circuit in *Continental Land Co.* v. *United States*, 88 F.2d 104, certiorari denied, 302 U. S. 715, and *Washington Water Power Co.* v. *United States*, 135 F.2d 541, certiorari denied, 320 U. S. 747. Each of these cases involved proceedings to condemn lands needed for reservoirs of dams constructed by the United States in the Columbia River. In each the district court rejected a claim of enhanced value predicated upon "power site value"; in each the court of appeals affirmed and this Court denied certiorari.

In the *Continental Land* case, the landowner asserted that "while the right to the river bed and to the flowing water of the river for navigation vested in the [United States], appellant [*i.e.* the landowner] had a claim of *inherent adaptability* in the uplands taken in the construction of the dam for 'use in the development of electrical power'" (88 F.2d at 109). The court of appeals held, however, that this Court's opinion in *Chandler-Dunbar* was "decisive" and that the landowner has, "as against the dominant right of navigation, no pri-

vate property right in uplands '*adaptable to special use*' in connection with the flooding of such uplands by the construction of a dam for navigation purposes, above the reasonable market value to which the land is adaptable now or in the reasonably near future for any purpose (not including, however, any hypothetical additional value to the owner, who had no 'right to appropriate the water to his personal use')" (p. 110). It added that the claim was "based upon something which is not possessed, and not being possessed, it has to appellants no value, and appellants lost nothing" (*ibid.*).

It is true that the opinion in *Continental Land* goes on to state a second ground of decision—that, in any event, the landowner had not shown that there was any reasonable probability of combination of its tracts and others in the reasonably near future for purposes of constructing a private power development (pp. 110-111). To whatever extent this may be thought to mute the conflict with the instant decision, it is plain that there is no possibility of dispelling the conflict with the Ninth Circuit's subsequent decision in the *Washington Water Power* case.

In that case, the district court had specifically excluded the landowner's offer to prove that it had spent more than $540,000 in purchasing, planning, developing, and maintaining the condemned land as a prospective power site, and that the value of the land for that purpose was between $480,000

and $550,000. The court then instructed the jury to return a verdict of $7,950.35. 135 F.2d at 542. Affirming on authority of its earlier decision in the *Continental Land* case, the court of appeals declared (p. 543):

> In the ordinary case, the evidence offered by the company would be pertinent as to the question of "reasonable probability" for the special use, and as to the value of the property for such use. However, this court has held that since a riparian owner has no property right in the bed of the stream or to the use of the water or the power inherent therein as against the United States, such riparian owner may not recover for the alleged power-site value of the riparian lands.

Thus, contrary to the suggestion of the court below (see p. 16a, *infra*), there is an inescapable conflict between the Fourth and the Ninth Circuits.

CONCLUSION

This case presents a question of federal law which is of general importance. The decision below effects a drastic departure from principles declared by this Court in the *Chandler-Dunbar* case. And it has created a direct conflict with decisions of another circuit, which should be resolved by this Court. It is respectfully submitted that the petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

NOVEMBER, 1954.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6805

No. 6806

No. 6807

UNITED STATES OF AMERICA, APPELLANT,

v.

TWIN CITY POWER COMPANY, AND WILLIAM P. DAUCHY, ITS MORTGAGEE, APPELLEES

August 30, 1954

Appeals from the United States District Court for the Western District of South Carolina, at Greenwood

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges

PARKER, Chief Judge:

These are appeals by the United States in three condemnation cases from awards of compensation for the taking of lands in connection with the Clark Hill water power and flood control development on the Savannah River. The lands taken had been acquired in South Carolina and Georgia by the Twin City Power Company for the development of a power project at Price's Island in the Savannah River and condemnation cases for their taking were instituted by the United States in the court below and in the United States District Court for the Southern District of Georgia. Motions by the

United States to strike portions of the answers which asserted the right of the owner of the lands to have their availability for the development of water power considered in connection with market value, raised before the judge below the only question presented by this appeal; and his opinion in entering the order denying the motions deals with the question ably and conclusively. See *United States* v. *1532.63 Acres of Land*, 86 F. Supp. 467.

Commissioners to value the lands were appointed by the court below acting in conjunction with the United States District Court for the Southern District of Georgia. *United States* v. *3928.09 Acres of Land*, 12 F. R. D. 127. The commissioners heard evidence on the question of compensation and filed a comprehensive report showing that the lands taken, when considered in connection with their availability for water power purposes, had a value of $267.02 per acre, and valued them accordingly. The commissioners further found that for agricultural purposes or as wild forest land, without reference to availability for development of water power, the lands would have had a value of around $37 per acre. The court below entered judgment for the landowner and its mortgagee in accordance with the valuation of the commissioners (*United States* v. *3928.09 Acres of Land*, 114 F. Supp. 719); and the United States has appealed.[1] No question

[1] The United States has filed notices of appeal to the Court of Appeals of the Fifth Circuit from like judgments entered in the United States District Court for the Southern District of Georgia.

is raised on the appeal except with respect to considering the availability of the lands for water power purposes on the question of valuation, the contention of the United States being that "the value of land as a potential power site on a navigable stream is not an element of just compensation under the Fifth Amendment". We agree with the judge below that this contention cannot be sustained.

There is practically no dispute as to the facts. They are thus stated by the District Judge in his order denying a petition for rehearing:

> The properties of the two Twin City corporations taken by the United States in these actions and in those pending in the Southern District of Georgia, extend some eleven miles along both sides of the Savannah River from Price's Island to Chamberlain's Ferry embracing some forty-seven hundred acres. Along this distance the Savannah River has a sixty-foot fall and a stream flow exceeding that at most of the hydro developments in Georgia and the Carolinas. At Price's Island on the Twin City properties there was an excellent dam site between spurs with sound foundation rock and ideal clay available for construction purposes.
>
> Twin City's ownership of a strip of land for a railroad siding to the C. & W. C. Railroad some two miles away, the proximity of nearby transmission facilities, the ownership of a res-

ervoir area free of houses, bridges, railroads and highways were factors materially minimizing construction costs. At the time of taking, conditions were favorable for the marketing of power.

Dams at the Price's Island site were economically feasible for use in connection with a sixty, seventy, eighty, ninety or one hundred foot head. Twin City owned practically all of the land needed for the sixty-foot development and therefore an integrated site for such a project. These properties embraced one of the best undeveloped hydro sites in the eastern part of the United States. This land was also useful for hydro-electric purposes in conjunction with up-stream and down-stream properties owned by others. The value of the Twin City lands would have been increased by up-stream developments at Calhoun Falls and at Hartwell which were under consideration at the time of taking.

These properties were under constant study for hydro-electric development from the time of the first acquisition for this purpose by Twin City in 1901. It was authorized to build dams in the Savannah River under six Acts of Congress enacted between 1901 and 1919. The Secretary of War and the Chief of Engineers approved its plans, the Federal Power Commission tendered Twin City a preliminary permit in 1926, for a development at Price's Island. From 1928 to 1932, the Savannah

River Electric Company held a Federal Power license to build at Clark Hill and to incorporate the Twin City properties into its development. From time to time other private interests were interested in acquiring these properties for river development. During the twenty-year period immediately preceding these condemnation proceedings the Army Engineers had this stretch of the Savannah under constant study in connection with both private and public hydro electric development. Finally in 1944, Congress decided that the project should be built by the United States and the Federal Power Commission therefore refused to issue a license for its construction to the private applicant, the Savannah River Electric Company. *Savannah River Electric v. Federal Power Com.*, 164 F. 2d 408.

These facts are largely undisputed. The great weight of the evidence supports the finding that this use for power purposes was so probable at the time of taking as to affect the market value of the property. The Government, having been attracted to the acquisition of this property because of its suitability for water power development, can hardly deny that the water power potential actually did affect its value in the market.

The amount of the award is supported by the preponderance of the evidence. Three competent and well qualified hydraulic engineers with large experience in this field, after fully

considering all of the pertinent factors, testified that in their respective opinions a prudent, competent and well-informed buyer, willing but not compelled to buy, trading with an equally well-informed, competent and willing seller would have paid substantially more than the award for these properties. The commissioners, evaluating all of the evidence, found that a figure, less than these given in these opinions, was just compensation and the two courts confirmed the aggregate of the awards in the companion decrees of August 26, 1953. On reconsideration I am convinced of the correctness of the findings in the decree.

It is provided by the Fifth Amendment to the Constitution of the United States that private property shall not be taken for public use "without just compensation"; and in arriving at just compensation all elements entering into the value of the property taken must be given consideration. The most profitable use of the land here being taken is use in the development of water power; and there is no basis in law or in reason why this element of value should be ignored. The land was acquired by the owner for that purpose; and it is now being acquired by the United States for that purpose. As was well said by the District Judge in his opinion (114 F. Supp. at 723):

All of the properties of Twin City and the entire eleven mile stretch of the Savannah River along which this land lay have been in-

corporated by the United States in its Clark Hill hydro development for water power purposes as its best and most valuable use. The testimony from both sides shows that during the entire period from 1901 to the date of taking Congress and all of the interested Federal agencies, without exception or dissent, considered that these properties of Twin City should be developed for water power, either by private interests or by the United States and either separately or in conjunction with other property.

The rule applicable in such a situation is that stated in *Olson v. United States*, 292 U.S. 246, 255, 256, as follows:

> The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held. *Boom Co.* v. *Patterson*, 98 U.S. 403, 408; *Clark's Ferry Bridge Co.* v. *Public Service Comm'n*, 291 U.S. 227; 2 Lewis, Eminent Domain 3d ed. sec. 707, p. 1233; 1 Nichols, Eminent Domain 2d ed. sec. 220, p. 671. The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from con-

> sideration if the possibility of combination is reasonably sufficient to affect market value. Nor does the fact that it may be or is being acquired by eminent domain negative consideration of availability for use in the public service. *New York* v. *Sage*, 239 U.S. 57, 61. It is common knowledge that public service corporations and others having that power frequently are actual or potential competitors, not only for tracts held in single ownership but also for rights of way, locations, sites and other areas requiring the union of numerous parcels held by different owners. And, to the extent that probable demand by prospective purchasers or condemnors affect market value, it is to be taken into account. *Boom Co.* v. *Patterson*, ubi supra.

See also *Boom Co.* v. *Patterson*, 98 U.S. 403, 407-408; *City of New York* v. *Sage*, 239 U.S. 57; *McCandless* v. *United States*, 298 U.S. 342; *United States* v. *Miller*, 317 U.S. 369; *Grand River Dam* v. *Grand-Hydro*, 335 U.S. 359, *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 275. When the case last cited was before this court on remand from the Supreme Court, we went carefully into the rule applicable in a case of this sort and laid down what we understand to be the proper rule in the following language (138 F. 2d at 345-6):

> Certainly one who has embarked upon the enterprise of a great water power development, has purchased and brought together thousands

of acres of land for the purpose and spent hundreds of thousands of dollars in the enterprise, is entitled to have his holdings valued on some other basis than that of numerous small separated tracts of wild mountain land, if it be found, irrespective of the possession of the power of eminent domain by the landowner, that "there is a reasonable probability of the lands in question being combined with other tracts into a power project in the reasonably near future". Market value is nothing but a hypothetical concept based upon what, in the opinion of those who know, a willing buyer would have to pay a willing seller of property in order to purchase it. The question here is, not what wild mountain land was selling for in the community, but what would the portion of land owned by Powelson and available for this water power development have been reasonably worth on the market when sold by one who was willing but not compelled to sell and bought by one who was willing but not compelled to buy.

And we do not think that, because the availability of the land for water power purposes arises from the fact that it is appurtenant to a navigable stream, such availability should be ignored in appraising value for purposes of condemnation. What is being taken is, not the flow of the stream or the bed of the stream, but adjoining land which is being taken to form the basin of a reservoir; and, if its present availability for such use adds to its market

value, there is no reason why this must not be taken into consideration in determining the compensation to be paid the owner, if just compensation is to be accorded him as required by the Constitution. We recognize, of course, that under the power to regulate interstate commerce the government has a servitude with respect to the bed of a navigable stream and the flow of water therein and may remove any obstruction to navigation without being liable in damages therefor (*United States* v. *Chicago, M. St. P. & P.R. Co.*, 312 U.S. 592); but that is not what the government is doing here. It is taking, not the bed of the stream, but lands adjacent to the stream and is taking them, not for purposes of navigation, but for the primary purposes of flood control and the development of water power.[2] Cf. *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 739-742.

It is well settled that the "right of the United States in the navigable waters within the several states is limited to the control thereof for purposes of navigation", (*Seattle* v. *Oregon & W. R. Co.*, 255 U.S. 56, 63); and that, as to fast land, "The absolute ownership and right of private property in such land is not varied by the fact that it borders on a navigable stream". *Pumpelly* v. *Green Bay Company*, 13 Wall. 166, 182. Consequently, even

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[2] That the purposes of the taking was not improvement of navigation but flood control and water power development see statement of facts by this court in the Clark Hill case, *Savannah River Elec. Co.* v. *Federal Power Commission*, 4 Cir. 164 F.2d 408.

where improvement of navigation is the purpose, any taking outside the bed of the stream of adjacent "fast" lands must be compensated for as in any other taking of private property. *United States* v. *Chandler-Dunbar Company*, 229 U.S. 53, 60, 65. This would seem to be elementary since the limitations of the Fifth Amendment apply to the government when exercising the commerce power as well as other powers. Certainly, it is absurd to contend that, because the government is given control of navigation in the river and may exercise the servitude incident to such control, it may build a dam for water power purposes and take lands of private owners to form a basin for the reservoir thus created without paying the reasonable value of the land so taken. As said by Mr. Justice Brewer in *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 337, 338:

> It would seem strange that if by asserting its right to take the property, the government could strip it largely of its value * * *. In other words, by the contention this element of value exists before and after the taking, and disappears only during the very moment and process of taking. Surely, reasoning which leads to such a result must have some vice, at least the vice of injustice.

Very much in point is the case of *United States* v. *Kansas City Insurance Company*, 339 U.S. 799, wherein the construction of a dam on the Mississippi River, purely in aid of navigation, caused the

raising of the river continuously to high-water level and, as the result of underflowing caused thereby, destroyed the value of adjacent lands for agricultural purposes. The court held that the United States in the exercise of the power to regulate commerce could not take lands beyond the bed of the stream without liability therefor, and that the underflowing of the riparian lands involved constituted a taking for which compensation must be paid. In distinguishing the case of *United States v. Willow River Power Co.*, 324 U.S. 499 and other cases holding that there was no liability for exercise of power relating solely to the bed of the stream, the court, speaking through Justice Burton, said (at p. 808):

> It is not the broad constitutional power to regulate commerce, but rather the servitude derived from that power and narrower in scope, that frees the government from liability in these cases. When the government exercises this servitude, it is exercising its paramount power in the interest of navigation, rather than taking the private property of anyone. The owner's use of property riparian to a navigable stream long has been limited by the right of the public to use the stream in the interest of navigation. See Gould on Waters, c. IV, secs. 86-90 (1883); 1 Farnham, Waters and Water Rights, c. III, sec. 29 (1904). This has applied to the stream and to the land submerged by the stream. There thus has been

ample notice over the years that such property is subject to a dominant public interest. This right of the public has crystallized in terms of a servitude over the bed of the stream. The relevance of the high-water level of the navigable stream is that it marks its bed. Accordingly, it is consistent with the history and reason of the rule to deny compensation where the claimant's private title is burdened with this servitude *but to award compensation where his title is not so burdened.* (Italics supplied).

The court appended the following note to the last sentence of the above quotation:

This is clearly illustrated in *United States v. Chicago, M., St. P. & P. R. Co., supra.* The United States raised the level of the navigable river above its ordinary high-water mark. This Court then declined to allow compensation for the damage caused to the segment of the respondent's embankment which concededly was located on land within the bed of the river. On the other hand, the lower court awarded compensation for the damage done to such segments of the embankment as concededly were on land above the bed of the river. No appeal was taken from that award. Finally, as to three other segments with regard to which there was a disagreement as to whether or not they were on land within the bed of the river,

this Court remanded the case to the District Court to resolve that factual issue.

It is argued that the adjacent owner does not own the water power value of the current of the river. This is true; but it is also true that the government does not own or have any servitude over the adjacent fast lands. A power development can no more be constructed without the one than without the other; and just as the adjacent owner may not take the current of the stream for his own uses from the government representing the public, so the government may not take his lands from him without making just compensation, which, as we have seen, includes every element which would properly be considered in determining market value. Value with respect to the water power of a river does not reside solely in the flow of the stream. Such flow would not create water power without the damming of the stream and the creation of a reservoir; and the reservoir could not be created without the taking of adjacent lands as a basin for it. It is because of the availability of adjacent lands for this purpose that they acquire value that they would not otherwise have; and such value may no more be ignored in fixing just compensation than may any other element entering into the determination of what a willing purchaser would have to pay a willing seller in order to acquire the lands.

There is nothing to the contrary in *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53; but that decision, we think, when properly interpreted supports

our conclusion. It was there held that the United States could not be required to pay compensation for requiring the removal from navigable waters of a dam which was an obstruction to navigation nor for resulting decrease in the value of a factory site on fast lands adjacent thereto; but it was held also that in valuing these fast lands account might be taken of their availability for lock and canal purposes. In overruling the exception of the government to an award of damages based upon availability for such purposes the court said (at pp. 76-77):

> The exception taken to the inclusion as an element of value of the availability of these parcels of land for lock and canal purposes must be overruled. That this land had a prospective value for the purpose of constructing a canal and lock parallel with those in use had passed beyond the region of the purely conjectural or speculative. That one or more additional parallel canals and locks would be needed to meet the increasing demands of lake traffic was an immediate probability. This land was the only land available for the purpose. It included all the land between the canals in use and the bank of the river. Although it is not proper to estimate land condemned for public purposes by the public necessities or its worth to the public for such purpose, it is proper to consider the fact that the property is so situated that it will probably be desired

and available for such a purpose. Lewis on Eminent Domain sec. 707; *Boom Co.* v. *Patterson*, 98 U.S. 403, 408; * * *.

The case of *United States* v. *Willow River Power Company*, 324 U.S. 499, which is relied on by the United States, involved, not the taking of shore land for power purposes, but the reduction in the generating capacity of a plant resulting from an authorized navigation improvement. See *United States* v. *Kansas City Ins. Co.*, 339 U.S. 799, 805-808. In *Continental Land Co.* v. *United States*, 9 Cir. 88 F. 2d 104 and *Washington Water Power Co.* v. *United States*, 9 Cir. 135 F. 2d 541, it appeared that there was no reasonable probability of the utilization of the lands for water power by private capital in the reasonably near future. Precisely the opposite is the case here, where the evidence shows that, but for the government's undertaking the construction at Clark Hill, the lands here would have been acquired by the Savannah River Electric Company for power purposes.[3] In so far as the two cases last cited may be construed as holding that, because a riparian owner of lands on a navigable stream has no property right in the bed or flow of the stream against the United States, he may not recover for the power site value of the lands, even though there is a present probability of their use for power purposes which has added

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[3] See *Savannah River Electric Co.* v. *Federal Power Commission*, *supra*. 4 Cir. 164 F.2d 408.

to their market value, we think that this is contrary to what is clearly held by the Supreme Court in cases heretofore cited.

We are not impressed by the argument that availability for water power development may not be considered in awarding compensation because under the Federal Water Power Act a development can be constructed in the river only under permit from the Federal Power Commission. As the Supreme Court pointed out in the recent case of *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, private proprietary rights existing under state law have not been abolished by the Federal Water Power Act. In that case the court said:

> The Act treats usufructuary water rights like other property rights. While leaving the way open for the exercise of the federal servitude and of federal rights of purchase or condemnation, there is no purpose expressed to seize, abolish or eliminate water rights without compensation merely by force of the Act itself.

In *Ford & Son* v. *Little Falls Company*, 280 U.S. 369, 377, 378, it was held that the act did not preclude the recovery of damages for the impairment of a water power as the result of the backing of water by a down stream development which the Federal Power Commission had licensed under the

act. The court, speaking through Mr. Justice (later Chief Justice) Stone, said:

> Whether the Commission acted within or without its jurisdiction in granting the license, and even though the rights which the respondents here assert be deemed subordinate to the power of the national government to control navigation, the present legislation does not purport to authorize a licensee of the Commission to impair such rights recognized by state law without compensation. Even though not immune from such destruction they are, nevertheless, an appropriate subject for legislative protection. See *United States* v. *Realty Co.*, 163 U.S. 427; *Guthrie National Bank* v. *Guthrie*, 173 U.S. 528, 535; *Joslin Co.* v. *Providence*, 262 U.S. 668, 675, 676; *Otis* v. *Judlow Co.*, 201 U.S. 140, 152; *Oswego & Syracuse R. Co.* v. *State*, 226 N.Y. 351, 356. Especially is there reason for such protection where, as here, their sacrifice may be involved in the grant of a valuable privilege to a licensee. We think that the provisions of the Act are quite sufficient in themselves to save respondents from any such appropriation of their water power.

See also *Grand River Dam* v. *Grand-Hydro*, *supra*, 335 U.S. 359, 372.

Some confusion in thinking seems to have arisen because the building of the dam at Clark Hill was unquestionably within the power of the government

and necessarily precludes the building of a dam at Price's Island. The answer is that the lands of plaintiff have value for water power purposes because they furnish a portion of the basin of a reservoir needed for the development of water power, and that this is true whether the dam creating the reservoir be located at Price's Island or at Clark Hill. There is nothing to show and no reason to think that their market value is any less because they can be used in connection with the development at Clark Hill than if they had been available for use only in connection with a development at Price's Island. There can be no question but that, if the Savannah River Electric Company had been allowed to construct the Clark Hill project, it would have had to compensate Twin City for the Price's Island property on the basis of the manifest value of that property for water power purpose. When the government takes over the project, there is no reason in law, in justice or in common honesty why it should not pay compensation on the same basis. As said by Mr. Justice Brewer in the passage above quoted from the Monongahela Navigation case, reasoning which leads to any other result "must have some vice; at least, the vice of injustice"; and injustice in determining compensation to be paid for property taken violates the requirement of the Fifth Amendment that the compensation be just.

Affirmed.

JUDGMENT

Filed and Entered August 30, 1954

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 6805

UNITED STATES OF AMERICA, APPELLANT,

vs.

TWIN CITY POWER COMPANY AND WILLIAM P. DAUCHY, ITS MORGAGEE, APPELLEES

APPEAL FROM the United States District Court for the Western District of South Carolina

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THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of South Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

JOHN J. PARKER,
Chief Judge, Fourth Circuit.
MORRIS A. SOPER,
United States Circuit Judge.
ARMISTEAD M. DOBIE,
United States Circuit Judge.

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